SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 77

GEORGE W. SOLESBEE,

Appellant,

vs.

R. P. BALKCOM, JR., WARDEN OF THE STATE PENITENTIARY, TATTNALL, GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

APPELLANT'S BRIEF

BENJ. E. PIERCE,
Counsel for Appellant.

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Appellee

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BRIEF OF BENJAMIN E. PIERCE, ATTORNEY FOR APPELLANT, IN COMPLIANCE WITH RULE 27 OF THIS COURT

(b)

The case appealed from has not yet been printed in the official reports of the Supreme Court of Georgia, but a copy of the same, together with a motion for rehearing and judgment thereon, is printed in the Record, pages 9-22. It has been published however in 52 (2d) Southeastern Reporter, page 433.

(c)

The ground upon which the jurisdiction of this Court is invoked is that Appellant is about to be executed without due process of law, in violation of the 14th Amendment of the Constitution of the United States, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d)

Statement of the Case

Appellant filed a petition for habeas corpus before the Honorable Melvin Price, Judge of the Superior Courts of the Atlantic Circuit in Georgia, alleging that he was about to be executed without due process of law in violation of the 14th Amendment of the Constitution of the United States. This petition was dismissed upon demurrer and upon appeal to the Supreme Court of the State of Georgia, that judgment was sustained; that Court summarized the questions presented to it (Record, pages 10-12) as follows:

> "George W. Solesbee filed in the Superior Court of Tattnall County, Georgia, on November 18, 1948, a habeas corpus petition against R. P. Balkcom, Jr., alleging the following: The petitioner is incarcerated in the State penitentiary at Reidsville, Georgia, where he has been ordered put to death by electrocution on November 20, 1948, by R. P. Balkcom, Jr., the warden of the said penitentiary, in pursuance of an order of the Honorable W. R. Smith, Judge of the Superior Courts of the Alapaha Circuit, presiding at Homerville, Clinch

County, Georgia, on November 5, 1948. (It was alleged that the said order was without authority of law and in violation of named constitutional rights of the petitioner because entered during a respite granted by the Governor of the State suspending execution of a previous sentence until November 8, 1948, but it is admitted in this court that the question has become moot by reason of the fact that the sentence was not executed because of the filing of the habeas corpus proceeding and the order of the court restraining the said warden from proceeding with the execution until the further order of the court, and, accordingly, it is unnecessary to state such allegations.) It was alleged that the prisoner was insane and cannot be executed, and that, since there is no provision of law whereby the question of his sanity or insanity can be judicially determined, no sentence of death can be legally imposed upon him. 'The only provision of law in the State of Georgia with reference to the manner in which one claims to have become insane subsequent to the entrance of a sentence of death is section 27-2602 of the Code of the State of Georgia, which is: "27-2602. (1074 P. C.). Disposition of insane convicts. Cost of investigations. —Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose, and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force. The cost of the investigation shall be paid by the Governor out of the contingent fund. (Acts 1903, p. 77.)"' The Code, Sec. 27-2601, expressly prohibits anyone from having 'an inquisition or trial to determine his sanity,' the said section being as follows: 'No person who has been convicted of a capital offense shall be entitled to any inquisition or

trial to determine his sanity.' To execute the petitioner without any judicial proceeding whereby and wherein he would be entitled to produce evidence as to his sanity and to be represented at a hearing for that purpose by counsel would be to deprive him of his life without notice or hearing and without any opportunity to obtain an original court hearing and adjudication of his sanity or to review the finding of any doctors' conclusions with reference thereto. Application was made to the Governor under the above section (27-2602) and three physicians were appointed to examine the petitioner, and they reported him sane, but the petitioner alleges that any inquisition which the Governor might set up under this section would be a mere matter of grace, and no order 'passed as a matter of grace and not because of any provision of law would be in conflict with due-process clause of the Constitution of the State and of the Fourteenth Amendment of the Constitution of the United States'-and therefore void, and such has been declared to be the law in numerous instances.

"It was prayed that the court grant the writ of habeas corpus requiring R. P. Balkcom, Jr., Warden of the State Penitentiary at Reidsville, to produce the body of the petitioner on a date and time to be fixed by the court in order to determine the legality of his incarceration and the legality of the authority under which the said warden purports to act under the said sentence, and also that the said warden be restrained from executing the petitioner until a hearing can be had on the petition.

"The court entered an order granting the prayers of the petition, setting the hearing on November 27, 1948, at 11:30 A. M. at the courthouse in Ludowici, Long County, Georgia.

"On the date set the warden produced the body of the petitioner and demurred to the petition on the following grounds: 1. No cause of action is set out in the petition. 2. (involving a question which has admittedly become moot, since the time set for the execution

of the petitioner in the sentence of November 5, 1948, has passed, and a new date for his execution would have to be set). 3. There is no conflict between the two Code sections referred to in the petition. The method provided by law for inquiring into the sanity of a person already under sentence of death is not in violation of the Constitution of this State or of the United States, and the method provided for does not deprive a person of his life without due process of law.

"The court sustained the demurrer and dismissed the action, on the ground that the Code, Section 27-2602, affords due process of law to the petitioner, which redress is shown by the petition to have been afforded him, and the petitioner was remanded to the custody of the warden."

The exception here is to that judgment.

(e)

A specification of the assigned errors as are intended to be argued are as follows:

1. The Supreme Court of Georgia divided its decision into two headnotes, to wit:

"1. A stay of execution is not based on any inherent right of one who has been convicted and sentenced to suffer death for the offense of murder, and such person is not entitled by any provision of law in this State to any inquisition as to alleged insanity after sentence. Code, Sec. 27-2601. Such investigation as may be made under the Code, Sec. 27-2602, by a commission of physicians as may, in his discretion, be appointed by the Governor arises out of a sense of public propriety and decency that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. The failure to accord such a person a judicial hearing and notice does not deprive him of due process of law under the State and Federal constitutions.

"2. The petition for habeas corpus showing that the petitioner had been convicted and sentenced to death for the offense of murder, and that the question of his alleged insanity after conviction and sentence had been investigated by a commission of three physicians, chosen by the Governor under the provisions of the Code, Sec. 27-2602, and that he had been found sane, but alleging that he was being detained by the warden of the State Penitentiary for execution of his sentence in violation of the due process clauses of the State and Federal constitutions, in that he had not been accorded a judicial determination of his alleged insanity, did not set forth a cause of action, and the trial judge did not err in sustaining the general demurrer of the respondent and in dismissing the action and remanding the petitioner to the custody of the respondent."

And appellant says that the Supreme Court erred in so ruling because the provisions of the Code of Georgia quoted in the decision of the Supreme Court which are Sections 27-2601 and 27-2602 do not provide due process of law as guaranteed by the 14th Amendment of the Constitution of the United States. Since Section 27-2601 makes no mandatory provision requiring the Governor of the State of Georgia to set up a commission to determine whether or not one who it was alleged had become insane subsequent to his conviction was sane or insane, but leaves it wholly within the Governor's discretion whether he will act at all. And Section 27-2602 lays down no rules to guide such commission in its investigation. It makes no provision whereby Appellant could have appeared, either by Counsel or in person or permit him to introduce any evidence before such commission as to whether or not he was sane or insane, neither were the members of such commission required to take any oath, but they were left absolutely to their own discretion in such matters. And Appellant says that this

does not provide due process of law as guaranteed under the 14th Amendment of the Constitution of the United States, but on the contrary expressly denied Appellant rights guaranteed thereunder.

(2) Because the Supreme Court of Georgia failed and refused to follow the principles ruled by this Court in the case of *Phyle* v. *Duffy*, decided June 7, 1948, reported in 334 U. S., 431-5, 92 L. Ed., 1492.

(3) Because the Court in the very opening paragraph of its opinion stated, "The life of the prisoner is by the conviction and sentence absolutely forfeited", and then proceeds to hold that Appellant had no other rights arising after conviction, to have his sanity inquired into, even if it intervened after conviction, by some judicial method, and to execute him would be to do so without due process of law in violation of the 14th Amendment of the Constitution of the United States and appellant says such ruling was error, because when the Supreme Court of Georgia found that the law of the State of Georgia "affirmatively" denied "an inquisition as to his sanity in such circumstances" such ruling was directly in conflict with the provisions of the 14th Amendment of the Constitution of the United States and of the decision of this Court in the *Phyle* case.

(4) Because when the Supreme Court of Georgia held the law to be as stated in its decision that "the law affirmatively denies such person any right to demand an inquisition as to his insanity in such circumstances, it being declared that, 'No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.' Speaking of the act from which this section was codified (Ga. L. 1903, p. 77), it was said in Lee *v.* State, 118 Ga. 764 (45 S. E. 628): 'Save as to pending cases, the connection of the courts with proceedings of

this nature has thus been ended. This seems to be now the declared policy of the State, after experience had under the act of 1897.' A stay of execution is not based on any inherent right of the prisoner. 14 Am. Jur. 804, Section 48. Any investigation into his alleged insanity is in no sense a trial of the offense for which he was indicted and convicted, but arises out of a sense of public propriety and decency, that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. Spann *v.* State, 47 Ga. 549; Carr *v.* State, 98 Ga. 89 (27 S. E. 148); Baughn *v.* State, supra; 14 Am. Jur. 806, Section 51. In keeping with this sense of propriety it is provided in the Code, Section 27-2602, that the Governor, may, in his discretion, have such person examined by such expert physicians as he may choose, and if he shall determine from the report of the physicians that the accused is insane he shall have the power of committing him to the Milledgeville State Hospital until the restoration of his sanity. Under the Code, Section 27-2603, providing for the reception into the State hospital of the prisoner, if found insane, it is stated that all the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to such insane person as far as applicable."

It should have then held that these provisions of the law of Georgia denied Appellant due process of law under the 14th Amendment of the Constitution of the United States and it was error not to so hold.

(5) Because the Supreme Court of Georgia recognized the principles ruled in the *Phyle* case but refused to apply the same to the law of the State of Georgia; and the acts of one of its public officers, was tantamount to setting up a different rule governing in Georgia than that governing

in all the other States of the Union, and its error is demonstrated by this statement of the Court, after reciting that, when a State does enact a rule with reference to how the question of insanity is to be determined it, "must afford the condemned person the right to demand and obtain a judicial determination as to his sanity", but when "the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares no such right" exists, then Georgia is placed beyond the pale of any restraint under the 14th Amendment of the Constitution of the United States.

(6) Because the Supreme Court of Georgia while discussing the provisions of the Code of the State of California, overlooked section 26-204 of the Code of Georgia which declared "an idiot is not to be found guilty or punished for any crime or misdemeanor with which he may be charged," since on page 8 of its decision the Georgia Supreme Court held "It is provided in section 1367 of the Code of California that 'A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane,' and thereby an absolute right is conferred upon the condemned person. To protect this right the due process clause of the Constitution may be invoked. But, as pointed out above, the State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he had no such right (Code Section 27-2601), and gives the State the power to postpone his execution only when he has been found insane by the procedure prescribed in the Code, Section 27-2602. Thus is demonstrated the inapplicability to the present case of the rulings and intimations of the United States Supreme Court in the *Phyle* case."

(7) And in so holding the Supreme Court of Georgia erred.

(Epitomized in statement of points to be relied upon—Record page 32.)

Argument and Authorities

From the foregoing it will be seen that the whole case is grounded upon guarantees under the 14th Amendment of the Constitution of the United States, as interpreted by numerous decisions of this Court; and especially in the case of *Phyle* v. *Duffy*, decided June 7, 1948, reported in 334 U. S. 431-45, 92 L. Ed. 1492, a summary of which is as follows:

> "One under sentence of death who, after having been judicially determined to be insane, was declared to be sane by a state doctor, without notice or hearing and without opportunity to obtain a court hearing or judicial review, unsuccessfully sought, by petition for habeas corpus in a state court, to obtain adjudication of his claim that he was insane and therefore entitled to the benefit of a statute prohibiting punishment of a person while insane for a public offense. Under the law of the state, one under sentence of death may obtain a judicial determination of insanity only in proceedings initiated by the act of the prison warden in calling to the attention of the district attorney the fact that there is good reason to believe that the prisoner has become insane.
>
> "The Supreme Court, in an opinion by Black, J., in which four other Justices joined, accepted the contention that the prisoner had a remedy under state law by mandamus proceedings to compel the warden to act, in which the court would determine whether upon the evidence there is reason to believe the prisoner insane, and accordingly held that as the state court's denial of habeas corpus may have rested upon the adequate non-Federal ground that his remedy was by mandamus, the due process questions raised by him were not ripe for decision.
>
> "Frankfurter, J., with whom Douglas, Murphy and Rutledge, JJ., joined, delivered a concurring opinion

with a view to making clear that the Court's refusal to consider the constitutional issues is contingent upon a determination by the state court that the law of the state is what the United States Supreme Court presupposes, namely, that state law affords a remedy whereby the convicted person may secure a judicial determination of his present sanity."

The Supreme Court of the State of Georgia stated the issues crystal clear, met them head on, and literally tossed them out of the window (Record, page 10). We insist that no clearer denial of a constitutional right can be found in the books. It is insisted that the record in this case makes a much stronger case than the record in the *Phyle* case. Here the highest Court of the State of Georgia in no uncertain terms, held:

"1. A stay of execution is not based on any inherent right of one who has been convicted and sentenced to suffer death for the offense of murder, and such person is not entitled by any provision of law in this State to any inquisition as to alleged insanity after sentence. Code, Section 27-2601. Such investigation as may be made under the Code, Section 27-2602, by a commission of physicians as may, in his discretion, be appointed by the Governor, arises out of a sense of public propriety and decency that one, though legally convicted and sentenced, should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf. The failure to accord such a person a judicial hearing and notice does not deprive him of due process of law under the State and Federal Constitutions.

"2. The petition for habeas corpus showing that the petitioner had been convicted and sentenced to death for murder, and that the question of his alleged insanity after conviction and sentence had been investigated by a commission of three physicians chosen by the Governor under the provisions of the Code, Section 27-2602, and that he had been found sane, but alleging that he

was being detained by the Warden of the State Penitentiary for execution of his sentence in violation of the due-process clauses of the State and Federal Constitutions, in that he had not been accorded a judicial determination of his alleged insanity, did not set forth a cause of action, and the trial judge did not err in sustaining the general demurrer of the respondent and in dismissing the action and remanding the petitioner to the custody of the respondent."

The Georgia Supreme Court placed a great deal of store by the case of *Nobles* v. *Georgia*, 168 U. S. 398, cited and discussed by this Court in *Phyle* v. *Duffy* (Record, page 14), but we respectfully insist that that case was decided in 1897, when the Georgia law was to the effect, as stated by the United States Supreme Court, as follows:

"The Georgia law under scrutiny in the Nobles case provided that the sanity of a person previously condemned to death should be determined by a tribunal formed in the following manner: 'The sheriff of the county, with the concurrence and assistance of the Ordinary thereof, *shall* summon a jury of twelve men to inquire into such sanity. . . .' If this tribunal found insanity the sheriff was required to suspend execution of sentence and report his action to the presiding judge." (Emphasis added.)

Now the law in effect when the *Nobles* case was decided was repealed by the Act of 1903 from which Act, Sections 27-2601 and 27-2602, were codified.

In *Cribb* v. *Parker*, 119 Ga., 298 (1, 2 and 3), the Supreme Court held:

"1. Penal Code, Sec. 1047, as amended by the Act of December 21, 1897 (Acts 1897, p. 41, Van Epps' Code Supp. Sec. 6757), was repealed by the Act of August 17, 1903, (Acts 1903, p. 77), providing for the abolition of trials or inquisitions, after conviction, as to the sanity of persons accused of capital offenses.

"2. The third section of the repealing act, which provided that that act 'shall not apply to any pending case,' has application only to inquisition of insanity pending under the act of 1897.

"3. After the date of the passage of the repealing act a judge of the superior court had no jurisdiction to entertain an original application for an inquisition of insanity under the act of 1897, or to grant an order suspending the sentence in the case."

So this being true the principles underlying the ruling in the *Phyle* case stand out in bold relief in substantiation of our position. In other words, Sections 27-2601 and 27-2602 put into the unbridled discretion of one man as to when one might have his sanity inquired into. And we insist that life should "not be taken by a State as the result of the unreviewable *ex parte* determination of a crucial fact made by a single executive officer," as said by the Supreme Court of the United States in the *Phyle* case.

In that case the Attorney General of California asserted that under the law of California the plaintiff there had a State remedy by mandamus to compel the Warden of the Penitentiary to empanel a jury to try the question of sanity which statement the Supreme Court of the United States accepted. Here, the Supreme Court of Georgia has held that there is no redress under the Georgia Law for one in plaintiff's plight.

Again the Supreme Court of Georgia seemed to bank a great deal on the fact that the State of California in the *Phyle* case cited a statute that "A person cannot be tried, adjudicated to punishment, or punished for a public offense while he is insane," (Record, page 20), but completely overlooked Sec. 26-204 of the Code of Georgia which provides that:

"An idiot is not to be found guilty or punished for any crime or misdemeanor for which he may be charged."

So, the distinction drawn, we respectfully insist is one without difference insofar as constitutional rights are concerned. (See Record, page 20 (6)). We realize that there may be some difference between "idiot" and "insane," but in reality, not insofar as the humanity of the law is concerned. But regardless of this, there "arises out of the sense of public propriety and decency, that one, though legally convicted and sentenced should not suffer death during his mental incapacity to realize his situation and perhaps invoke some remedial measure in his own behalf," as stated by the Georgia Supreme Court in its decision, but it goes on to hold that Sections 27-2601, 27-2602, etc. prescribe due process of law under the 14th Amendment of the Constitution of the United States, and therein lies "the heart of (Appellant's) charge—that he" has been denied due process of law.

It is ruled by the Supreme Court of Georgia that all appellant was entitled to was a matter of grace. That Court said—(Record, top of page 14):

> "The procedure authorized for investigating the alleged insanity of the condemnee is, as properly termed by Counsel for the petitioner, an *act of grace*, which, as hereinbefore shown, arises solely out of public propriety and decency." (Emphasis added.)

We insist that "grace" is no due process of law, as defined by the Courts.

Central of Georgia Railroad Company vs. *Wright*, 207 U. S., 127, 52 L. Ed. 134.

Security Trust and Vault Company vs. *City of Lexington*, 203 U. S., 323, 51 L. Ed., 204.

Shippen Lumber Co. v. *Elliott*, 134 Ga., 699.

Piggly-Wiggly Co. Co. v. *May Investing Cor.*, 189 Ga., 481.

In the brief for Respondent, it is stated:

> "The appellant contends that he is being deprived of his Constitutional rights because there is no provision of Georgia Law *under which he may appeal from the decision of the Commission appointed by the Governor to examine into his sanity.* (Emphasis added.) The State of Georgia submits that there is no merit to this contention since the law of Georgia makes no provision for such appeal. No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.
>
> "The appellant contends that the Commission appointed by the Governor was not a judicial determination of the question of his sanity and that to refuse him the right of appeal from said Commission would be denying him of his Constitutional rights.
>
> "The State of Georgia contends that he was not entitled, as a matter of law, to the right of appeal from said Commission, and we cite the following Federal cases:"

In this statement Counsel are in error. It is not a question of the denial of an appeal, but a question of the right to be heard.

We insist that the Supreme Court of Georgia in holding that Sections 27-2601 and 27-2602 provide due process of law, is to overlook the principles of law as laid down in Cooley's Constitutional Limitations, Chapter XI, page 353, where it is said, after citing the provisions of the several State Constitutions defining due process of law that:

> "No definition, perhaps, is more often quoted than that by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Every-

thing which may pass under the form of enactment is not the law of the land.'

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry', and 'render judgment only after trial.' It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong, unless you choose to do it'."

The State cannot act upon one of its subjects except when it does so, "according to pre-established regulations," because "Matter without form is chaos; power without form is anarchy. The State were it to disregard forms, would not be a government, but a mob. Its actions would not be administration, but violence. The public authority has a formal embodiment in the State, and when it moves, it moves as it has said by its laws it will move" (as said by Justice Bleckley in *State* v. *Cochran*, 62 Ga. 731). And those laws must conform to the 14th Amendment of the Constitution of the United States.

Much solicitude has been shown for the freedom of speech, the freedom of the press, and freedom of religion, under the 14th Amendment of the Constitution of the United States, and we insist that there should be no turning the back of the hand to one in the plight of petitioner.

Speaking of freedom of speech, and in holding an ordinance of the City of Lockport, New York which required

the procural of a license from the Chief of Police to operate a loud speaker unconstitutional, the Supreme Court of the United States in the case of *Saia* v. *New York*, October Term, 1948 93 L. Ed., page 1089, said:

> "There are no standards prescribed for the exercise of his discretion. . . . The right to be heard is placed in the uncontrolled discretion of the Chief of Police."

So it is with reference to the Governor of Georgia. He "may" appoint a Commission, but no power on earth could compel him to do so. And even though a Commission is appointed "there are no standards prescribed for the exercise" of its "discretion," no right to be heard, or to offer any proof.

We insist the law under discussion is completely lacking in any semblance of constitutional requirement. We do not believe this Court will ever "retreat from the firm position" the Supreme Court of the United States has "taken in the past," but will give the "same preferred treatment" that it has given to "freedom of religion in the Cantwell case, freedom of the press in the Griffin case, and freedom of speech and assembly in the Hayne case," to a law involving human life. (Douglas, Justice, in *Saia* v. *New York*, *supra*.)

The question might be suggested: "Do you expect a Court to release one who stands convicted of murder?" That question is easier posed than answered. The Supreme Court of the United States has held that it would do so before it will permit one to be executed contrary to a constitutional guarantee.

In the case of *Ex Parte Medley*, 33 L. Ed., page 835, the Supreme Court of the United States said (at page 841): 134 U. S. 160:

> "What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody

of the warden of the penitentiary under the order and judgment of the court, because, within the language of section 753, he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the Statute under which he is now held in custody is an ex post facto law in regard to his offense, it repeals the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the Court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the attorney-general of the State of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court."

In this case there is no officer into whose custody Appellant could be remanded to, who could, or would, do otherwise, than execute him. In *Ex Parte Medley*, this Court evidently thought that there might be.

We quote the language of Chief Justice Stone of this Court in the case of *Ex Parte Richard Quirin*, 317 U. S. 1, 87 L. Ed. 1, (quoting from page 11):

"We are not here concerned with any question of guilt or innocence of petitioner. Constitutional safe-

guards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."

The facts in the Record are admitted by the demurrer, and this Court is not confronted with any conflict with reference thereto.

We advert once more to the *Phyle* case. In speaking of the *Nobles* case, this Court there said:

> "The Nobles case we do understand to be an authority for the principle that a condemned defendant cannot automatically block execution by suggestions of insanity, and that a State tribunal, particularly a judge, must be left free to exercise a reasonable discretion in determining whether the facts warrant a full inquiry and hearing upon the sanity of a person sentenced to death."

But the Georgia Law, as now construed by its highest Court holds that no such law now exists, and that no judge or judicial tribunal has any such authority. At one time Georgia had such a law; now it has none.

We insist that the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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